IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VERIZON CALIFORNIA, INC. *et al.*	)
	)
Petitioners,	)
	)
v.	) No. 08-1234
	)
FEDERAL COMMUNICATIONS COMMISSION	)
and UNITED STATES OF AMERICA,	)
	)
Respondents.	)

OPPOSITION OF THE FEDERAL COMMUNICATIONS COMMISSION TO VERIZON'S MOTION FOR STAY

The FCC opposes Verizon's request for a stay of the agency's adjudicatory ruling in *Bright House Networks v. Verizon California*, FCC No. 08-159 (rel. June 23, 2008) (*Order*). Section 222(b) of the Communications Act bars the use for marketing purposes of proprietary information an incumbent carrier receives from a competing carrier in the course of transferring a customer's telephone number from the incumbent to the competitor. In the unique circumstances of the telephone market, the competing carrier has no choice but to reveal sensitive business information to the incumbent in order to have a customer's number transferred. Because the competitor conveys the information only for that limited, ministerial purpose, the statutory restriction ensures that the incumbent uses it only to complete that task – and not for its own marketing. Despite having complied with that provision for more than eight years, Verizon recently began to violate it by using competitors' information in attempts to convince customers who had decided to switch their service to competitors to remain with Verizon. On a complaint by competing carriers, the Commission ordered Verizon to cease its violative conduct.

Verizon fails the test for a stay of that order. Its statutory claims rest on the alleged plain meaning of the statute, but section 222(b) is ambiguous, and the Commission's interpretation of it was reasonable. Verizon's constitutional claim is derivative of its statutory claims, and it fails for the same reasons. Verizon's token effort to demonstrate injury resulting from the statute does not justify equitable relief, especially in light of the facts that Verizon did not engage in these practices until very recently and that no other carrier in the industry does so. The order simply directs Verizon to return to its previous practice and follow the same rules as everyone else.

BACKGROUND

1. Congress has established a national policy to replace the longstanding monopoly in the local telephone market held by carriers such as Verizon with facilities-based competition. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996); *see AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). Congress forbade states from preventing competitive entry of new carriers, 47 U.S.C. § 253(a), and required all telecommunications carriers to interconnect with other carriers, 47 U.S.C. § 251(a)(1). Importantly here, Congress also required that all carriers provide "number portability," 47 U.S.C. § 251(b)(2): the ability of users to "retain … existing [telephone] numbers … when switching from one telecommunications carrier to another," 47 U.S.C. § 153(30). Congress found that

number portability is "necessary for opening the local exchange market to competition." S. Rep. No. 104-23 at 19-20 (1995). Indeed, "[t]he ability to change service providers is only meaningful if a customer can retain his or her local telephone number." H.R. Rep. No. 104-204 at 72 (1995).

The need to port phone numbers makes competition in the local exchange market fundamentally unlike competition in other markets, including those for video and internet services. In other markets, a customer may switch service providers by canceling the current service and immediately beginning service with a new provider. The former provider does not necessarily know why the customer canceled service, whether the customer has switched to a different provider, who that provider is, or when any new service will begin.

In the local exchange market, by contrast, a new carrier cannot provide service to a customer who wants to retain his number until it has been ported to the new carrier, which requires that carrier to ask the incumbent carrier to transfer the number. A request to port is strictly a carrier-to-carrier process in which the new carrier must submit a "Local Service Request" (LSR) to the incumbent provider that asks both to cancel the current service and to port the number to the new carrier. *Order* ¶5.[1] The LSR necessarily reveals to the incumbent carrier – the very company from which the competitor has just lured away the customer – proprietary business information concerning the new business relationship that a

[1] The new carrier must request in a single LSR both service cancellation and porting. A customer may not directly request a number port. *See* Joint Statement of Stipulated Facts ¶18.

competitor would never ordinarily disclose to an incumbent, including the fact that the customer is changing carriers; the new carrier's identity; the customer's identity, address, and phone number; and the date on which the new service will begin. *Order* ¶5. The incumbent carrier would have no access to that competitively sensitive information but for its position as incumbent. The Commission has found that in such a situation, the incumbent provider has "an incentive to act anticompetitively, as would any carrier that executes changes … for competing carriers." *Slamming Order*, 14 FCC Rcd 1508, 1570 (1998).

In particular, an incumbent carrier facing the loss of a customer to its competitor can, during the time between the request and the port (the standard is four days), use the proprietary service change request information to attempt to negate the switch and convince the customer to remain with the incumbent carrier by offering various financial inducements. Such behavior would amount to unfair competition because it allows the incumbent carrier to take advantage of otherwise secret information that its competitor was forced to disclose.

To protect against that occurrence, Congress directed that "[a] telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts." 47 U.S.C. § 222(b). Congress did not impose such a requirement for other markets, such as video distribution.

2. The Commission has consistently interpreted section 222(b) to forbid the use for marketing purposes of any information conveyed by a competing carrier to

an incumbent carrier in the course of a request to change service providers.

In 1998, the Commission found it unlawful in the long-distance context for an incumbent carrier that has been asked to change service to a competitor to "send[] a subscriber who has chosen a new carrier a promotional letter … in an attempt to change the subscriber's decision." *Slamming Order*, 14 FCC Rcd at 1572. The incumbent carrier "should be a neutral party without any interest in the choice of carriers made by a subscriber" and thus "may not use information gained from a carrier change request for any marketing purposes including any attempt to change a subscriber's decision to switch to another carrier." *Id*. at 1574. The "change request is proprietary information because [the competitive carrier] must submit that information to the executing carrier in order to obtain provisioning of service for a new subscriber." *Id*. at 1573. "[S]ection 222(b) works to prevent anticompetitive conduct … by prohibiting marketing use of carrier proprietary information." *Ibid*. But for its position, the incumbent "otherwise would have no knowledge at that time of a consumer's decision to change carriers." *Ibid*. No carrier sought review of those conclusions.

In 1999, the Commission reiterated its understanding of section 222(b). The Commission found that "competition is harmed if *any* carrier uses carrier-to-carrier information, such as switch or PIC orders [which ask to switch long-distance carriers], to trigger retention marketing campaigns." *CPNI Reconsideration Order*, 14 FCC Rcd 14409, 14449 (1999) (emphasis in original). Thus, "where a carrier exploits advance notice of a customer change by virtue of its status as the underlying network-facilities or service provider to market to that customer, it does so in violation of section 222(b)." *Id*. at 14450. The agency "consequently prohibit[ed] such actions." *Id*. at 14449. Again, no carrier sought review.

In the same order, the Commission denied requests by Bell Atlantic and GTE (which later merged to form Verizon) for forbearance from section 222(b)'s restrictions. The agency was "not persuaded … that permitting carriers to unfairly use information they obtain" from their position as an incumbent carrier "is in the public interest." 14 FCC Rcd at 14452. In particular, although "in the short-run allowing carriers to use carrier proprietary information to trigger retention campaigns may result in lower rates for some individual customers, … over the long-term" it would "promot[e] competition … [to] protect[] competitively-sensitive information." *Id*. 14450, 14452-14453. Neither company sought review of that decision.

3. Beginning in June 2007, despite the Commission's earlier decision not to forbear from enforcing the statute against it, Verizon began to use information derived from competitors' number porting requests in efforts to retain customers who had decided to switch carriers. *Order* ¶7. Specifically, each day, Verizon generates a "lead list" of all customers who have asked to terminate their service. It then uses information gleaned from porting requests to retain on the list only those customers who have decided to switch to a competitor. *Ibid*. It immediately contacts those customers by mail, telephone, or email, and offers them various inducements, such as discounts and cash-equivalent rewards, to cancel their planned switch of carrier. *Id* ¶8.

Three cable television companies that offer telephone service through other carriers (referred to by the Commission as the “Competitive Carriers”) filed a complaint with the FCC against Verizon under 47 U.S.C. § 208. In the *Order*, the Commission granted the complaint in part and held that Verizon’s new marketing practices violate section 222(b).

The Commission, rejecting a recommendation from the Enforcement Bureau, found that Verizon’s retention marketing fit each element of the statute, holding that Verizon “receives proprietary information from the Competitive Carriers; that this information is contained in number porting requests that were submitted for the purpose of the Competitive Carriers providing telecommunications service to the Complainants, and for the purpose of Verizon providing telecommunications service to the Competitive Carriers; and that Verizon uses the proprietary information for its own marketing efforts.” *Order* ¶11. Having found a clear-cut violation of the statute, the Commission directed Verizon to cease and desist from using the information in its marketing. Verizon remains free to market its services to its customers at any time and in any way it chooses that does not depend on the use of competitors’ proprietary information.

ARGUMENT

To justify extraordinary equitable relief, Verizon must show that it has a substantial likelihood of success on the merits of its claim, that it will suffer irreparable injury in the absence of a stay, that the public interest favors a stay, and that other parties will not be harmed by the grant of a stay. D.C. Cir. Rule 18(a). Verizon meets none of those criteria.

At the outset, we note the odd nature of Verizon's request. It purports to seek a stay only of the Commission's cease-and-desist order, but that order rests on a determination that Verizon's marketing practices violate a longstanding statutory prohibition. Thus, unlike the typical stay request, Verizon asks not that the Court preserve the status quo in the wake of a newly imposed regulatory requirement, but that it in effect bar the application of established rules with which Verizon complied for more than eight years and with which every other carrier in the industry continues to comply. The net result would be not a "stay" at all, but a type of preliminary declaratory ruling. Although the Court surely has authority to grant such relief, it should do so only on the most compelling showing, which Verizon has come nowhere near.

A. Verizon Has Little Likelihood Of Success On The Merits.

Section 222(b) forbids the use for marketing purposes of any proprietary information received by an incumbent carrier from a competing carrier in the course of changing service providers. Verizon violated that prohibition, and the Commission thus reasonably ordered it to stop doing so. Verizon stands little chance of successfully challenging that determination.

1. Verizon challenges the Commission's interpretation of the statute, claiming that it is barred by the plain meaning of the provision. Section 222(b) states:

> A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

To the degree the statute is ambiguous, the Commission's interpretation of it is entitled to deference. *Chevron v. NRDC*, 467 U.S. 837 (1984).

Verizon initially argues that it "does not use another carrier's proprietary information" and thus "section 222(b) does not apply." Mot. 10. The main argument is that requests to cancel service and port the number "are directions Verizon receives from its retail customers" and are thus not proprietary to the competing carriers. The argument fails on multiple fronts.

First, Verizon is wrong that the incumbent carrier receives the porting request "from its retail customers." Mot. 10. The request must be made by the competing carrier through an LSR form that must be submitted by a carrier. *See* p.4, *supra*. A customer may not submit a porting request. Moreover, the competing carrier is not acting solely as a conduit for a customer's direction. The Commission found, that although the competing carrier is "effectuat[ing] the customer's choice of carrier," it is "also acting to promote its own commercial interests, which requires conveying its own proprietary information." *Id*. ¶16.

Second, Verizon is wrong that a request to port is not proprietary information. "Proprietary" as used in this context means "private." *See* American Heritage Dictionary of the English Language 3rd ed. at 1453 (1992). Any information held by a competitive carrier that would enable an incumbent carrier to try to undo the switch and retain the customer is obviously private: no rational competitor would voluntarily reveal such information to the incumbent. The Commission accordingly found nine years ago that "carrier change information is carrier proprietary information." *CPNI Reconsideration Order*, 14 FCC Rcd at

14450; *see Slamming Order*, 14 FCC Rcd at 1573 (a request to change carriers "is proprietary information because [the competitive carrier] must submit that information to the [incumbent] carrier in order to obtain provisioning of service for a new subscriber").[2] That understanding of the statutory language is entirely reasonable (and Verizon does not challenge it), especially given the intent of the statute to remediate competitive imbalances in the peculiar circumstances of the local telephony market.

Verizon is wrong that information is not proprietary because the incumbent carrier may use it for marketing purposes if the customer himself reveals it to the incumbent carrier. Mot. 10-11. The Commission rejected that argument five years ago. *Third Slamming Reconsideration Order*, 18 FCC Rcd 5099, 5104, 5109 (2003). The customer, unlike a competitive carrier, is not required to reveal to the incumbent carrier any proprietary information in order to switch service providers. Thus, the competitive harm that the statute remedies is not present when a customer himself *voluntarily* initiates contact. Congress recognized as much when it limited the restriction on information in section 222(b) to that received "from another carrier." Moreover, just because a customer may reveal information to the

[2] Although the request to port alone is proprietary information, Verizon's claim that the service cancellation and porting request is the "only information that Verizon uses" is untrue. Mot. 10. Verizon strikes from its "lead list" "customers who are purchasing service from a Verizon wholesale customer," *i.e.*, it directly uses the identity of the competing carrier. Joint Statement ¶37. Verizon also "compiles five pieces of information" about each customer: name, telephone number, disconnect order number, due date, and address, *id*. ¶38; the due date is displayed on the "first screen a customer service representative sees," *id*. ¶41.

incumbent carrier does not make that information any less proprietary to the competitive carrier when the customer has not done so. Businesses do not share their customer lists with competitors, but treat such information as extremely sensitive, even though the customers themselves are free to tell competitors of the relationship. As a practical matter, because porting requests are submitted by competing carriers, the Commission found that Verizon has no source of the information that a customer plans to switch carriers "other than the proprietary information contained in the LSRs" from competing carriers. *Order* ¶35.

2. Verizon next argues that that under its "express terms" and "unambiguous meaning," section 222(b) applies only when a carrier is "acting in a wholesale capacity," Mot. 9, 12, 14, and that service to individuals, the alleged type at issue here, is "retail" service that is not covered by the statute. At the outset, the claim fails because it reads into the statute a term – "wholesale" – that simply is not there. Section 222(b) nowhere distinguishes between information received for the purpose of providing telecommunications service to another carrier and information received for the purpose of providing telecommunications service to a retail customer. Both categories are covered by the terms of the statute, and Verizon's plain meaning argument is thus plainly wrong.

Verizon also errs when it claims that the Commission has "consistently given" the statute a different meaning by restricting its application to wholesale provision of service. Mot. 12. It is true that the Commission has used the terms "wholesale" and "retail" in applying the statute, but it did so "to identify the source of the carrier-change information." *Order* ¶26. "Wholesale" as used in the earlier orders refers to carrier-to-carrier communications (such as an LSR), use of which by the receiving carrier the statute restricts directly; "retail" refers to customer-to-carrier communications, use of which the statute does not limit.[3] In the *CPNI Reconsideration Order*, for example, the Commission held that section 222(b) prohibited incumbent carriers from using *any* "carrier-to-carrier information," 14 FCC Rcd at 14449, but it then determined that an incumbent carrier is free to use information that it "has independently learned from its retail operations," *i.e.*, that a customer reveals directly. 14 FCC Rcd at 14450; *accord Third Slamming Reconsideration Order*, 18 FCC Rcd at 5110. The Commission thus properly saw "no limiting construction in any Commission order" restricting the scope of the statute to wholesale services. *Order* ¶26. Indeed, in 2003, the agency expressly held that information submitted to effectuate a long-distance carrier change "may only be used by the executing carrier to effectuate the provision of service *by the submitting carrier to its customer*." *Order* ¶21 (emphasis in original), citing *Third Slamming Reconsideration Order*, 18 FCC Rcd at 5109-5110. There has been no departure at all from earlier orders, let alone an unexplained one.

Verizon also contends that the Commission's conclusion that "the statute applies when some carrier *other than* the receiving carrier intends to provide a telecommunications service . . . is contrary to the unambiguous terms of the statute." Mot. 14. The Commission properly determined, however, that section

[3] Verizon's own practices follow that understanding: a competing carrier requesting a port submits the LSR to Verizon Partner Solutions, Verizon's wholesale operating entity. Joint Statement ¶20.

222(b) is ambiguous in this regard. The statute governs information received from another carrier "for purposes of providing *any* telecommunications service," (emphasis added) but "does not expressly state *whose* provision of telecommunications service is covered." *Order* ¶19. On its face, the statute could apply "when the receipt of proprietary information is for purposes of (i) the *submitting* carrier … 'providing any telecommunications service,' or (ii) the *receiving carrier* … or (iii) either the submitting carrier or the receiving carrier." *Ibid*. The Commission decided that section 222(b) thus covers a carrier's submission of information to another carrier for the purpose of the submitting carrier's provision of service. The incumbent, in turn, uses the submitted information "only for such purposes" when it provides a function – porting the number – that is necessary to effectuate the competing carrier's purpose – the provision of telecommunications service.

That reading of the statute was reasonable. To begin with, it is fully consistent with the statutory language, particularly with Congress's prescription that the statute applies to the provision of "*any* telecommunications service." Moreover, the Commission explained that "the fundamental objective" of section 222(b) is "to protect from anti-competitive conduct carriers who, in order to provide telecommunications services to their own customers, have no choice but to reveal proprietary information to a competitor." *Order* ¶22. An incumbent asked to switch carriers "should be a neutral party without any interest in the choice of carriers made by a subscriber." *Slamming Order*, 14 FCC Rcd at 1574.

Verizon's preferred interpretation would leave "irrational gaps" in the statute that are inconsistent with its remedial purposes. *Order* ¶23. For example, although the 1996 Act was intended to "promote facilities-based local competition," *Order* ¶27, Verizon's approach would protect resellers and UNE-based competitors that purchase network elements from Verizon, but not facilities-based competitors, a result that undermines the statutory policy. *Ibid*. Verizon offers no response to the Commission's policy concerns.

3. In any event, the Commission reasonably held in the alternative that, even if section 222(b) does not apply to information received from a carrier for the purpose of the submitting carrier's provision of service, "Verizon's provision of [number portability] constitutes a telecommunications service," both to the competing carrier and to its own customers. *Order* ¶¶30-32. The Commission historically has deemed to be telecommunications services "functions that are incidental or adjunct to common carrier transmission service" or that are "an integral part of, or inseparable from, transmission of communications." *Id*. ¶31 (quotation marks omitted).

The Commission found that number porting constitutes "such an adjunct to basic service" in several ways. *Order* ¶32. First, porting "is a vital part of the telecommunications services that [Verizon] provides to" the carrier to which the number is ported, because without that porting service "Verizon could not route traffic to its former customer," as required by interconnection agreements between Verizon and its competitor. *Id*. ¶32. The Commission found further that "implementing [number portability] requires Verizon to be involved in properly switching and transmitting calls to the new carrier." *Ibid*.

Second, for those same reasons, porting is an aspect of the telecommunications service Verizon provides to its own customers when they call a number that has been ported. Verizon critically does not contest that determination, *see* Mot.13-14, but only claims that such service is not covered by the statute because it is provided to a *retail customer* instead of a *carrier*. As explained above, however, this argument reads a limitation into the statute that does not exist. *See supra* at 11. Thus, even if the statute could be read to apply only when the incumbent carrier is providing a telecommunications service, Verizon is providing such a service when it provides number porting. Such a determination falls well within the Commission's expert discretion to determine what is or is not adjunct to telecommunications service, and Verizon has provided no genuine basis to call into question its reasonableness.

4. Finally, Verizon claims that the Commission's interpretation of section 222(b) violates the First Amendment because it restricts Verizon from "select[ing] its audience," and "tailor[ing] the content of its speech to that audience, and because it restricts "the rights of willing listeners to receive … truthful marketing speech." Mot. 15. Even assuming that limiting the use of another carrier's proprietary information constitutes a restriction on speech, doing so is lawful, as the Commission determined when Verizon's predecessors raised the same argument in 1998. *Slamming Order*, 14 FCC Rcd at 1573-1575.

Any speech at issue here is purely commercial, and thus occupies a "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). As a result, the First Amendment permits regulation of commercial speech as long as the restriction directly advances a substantial government interest and is narrowly tailored to serve that interest. *Central Hudson Gas & Elec. Co. v. Public Svc. Comm'n*, 447 U.S. 557, 563-566 (1980). The Commission found that its order met that test. *Order* ¶44.

Verizon does not contest that section 222(b) serves a substantial government interest. Rather, its argument is that the Commission's application of the statute to Verizon in the present context fails to serve that interest "when the information at issue is not proprietary information of another carrier and is not obtained by virtue of Verizon's wholesale role." Mot. 15-16. The First Amendment argument, in other words, is entirely derivative of Verizon's other arguments – and as shown above, those arguments are wrong. The information *is* proprietary, and the applicability of the statute *does not* depend on whether or not Verizon obtained the proprietary information in a "wholesale role."

Thus, the restriction on Verizon's use of the information serves the statutory purpose exactly. The point of the statute is to prevent the anti-competitive behavior that can arise when an incumbent carrier misuses for its own marketing the proprietary information that it obtains only for a different purpose – to port a number. In that limited circumstance, "the government cannot promote its interest … except by regulating speech because the speech itself … causes the very harm the government seeks to prevent." *Trans Union Corp. v. FTC*, 267 F.3d 1138, 1142 (D.C. Cir. 2001). Verizon's claim that there is no government interest in prohibiting the incumbent carrier from using information obtained from the competing carrier because the incumbent may use the information if it is received directly from the customer fails for the reason discussed at pages 10-11 above.

Verizon does not seriously contest that the restriction is narrowly tailored, nor could it. Verizon is permitted to market its services at will to any customer at any time by mail, telephone, email or any other means. There is no restriction on the content of its marketing messages.[4] Verizon may use porting information for marketing purposes if it obtains the information voluntarily from the customer rather than involuntarily from the competing carrier, and it may use carrier-to-carrier information after the port takes place. The only thing Verizon may not do is use proprietary information the competing carrier is forced to reveal to Verizon solely by virtue of its status as an incumbent provider during the limited time between the porting request and the port. *See Slamming Order*, 14 FCC Rcd at 1574-1575 (statute "ensures that the executing carrier remains in its role as a neutral administrator").

Verizon contends briefly that the Commission has created a "sharp disparity" in regulation between the telephone and video markets, which "favor[s] one group of speakers over another." Mot. 16-17. That claim ignores a fundamental difference between the video market and the telephone market: in the

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[4] To the extent that Verizon is concerned that its customers are not aware that the company offers video services, Mot. 3-4, it is free to generally inform them of that fact, and indeed, would seem to have a powerful incentive to do so whether or not the customer is contemplating switching voice service.

video market, quite unlike the telephone market, a competing service provider may begin providing service immediately, does not have to ask the existing provider to release the customer, and does not have to reveal to the existing provider the fact that (and the date on which) the customer is switching service providers. The First Amendment does not require that all speakers be treated the same without regard to basic differences in their situations.

B. VERIZON HAS SHOWN NO IRREPARABLE INJURY.

Verizon makes only a token effort – about two pages out of twenty – to show injury, and that meager effort fails. Its principal claim is that it will suffer a deprivation of First Amendment rights, but as shown above, it will experience no such harm.

Verizon also claims that it will lose customers to competition. In the same breath, however, it discusses the "hyper-competitive communications marketplace," which suggests strongly that it has the ability either to re-gain customers lost to its competitors, or to win new customers for its video services by enticing them away from cable companies. In such a competitive market, "revenues and customers lost to competition which can be regained through competition are not irreparable." *Central & Southern Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301, 309 (D.C. Cir. 1985) (internal quotations omitted).

Verizon's claim of irreparable injury that must be remedied on an expedited basis rings especially hollow in light of its compliance with section 222(b) until 2007, and the practice of every other carrier in the industry of refraining from using porting requests to engage in retention marketing. Indeed, the Commission set forth its interpretation of section 222(b) and denied Verizon's corporate predecessors' request for forbearance from section 222(b) nine years ago in the *CPNI Reconsideration Order* and they did not bother to appeal the ruling. If the matter were as urgent as Verizon suggests, Verizon presumably would have acted earlier. In that light, any injury can hardly be characterized as "immediate" and "irreparable," as required for equitable relief. *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998).

As explained above, there is no unfair competitive disparity between Verizon and cable companies: each is treated in exactly the same way when acting as a video provider and when acting as a telephone company. The telephone market is unique in that a competitor must ask an incumbent provider to release the customer before it may begin providing service, and in doing so must reveal proprietary information to the incumbent against which it directly competes. Thus, neither Verizon nor the complainants may engage in retention marketing during the porting period. For example, if a customer decides to switch from Comcast's voice service to Verizon's, Comcast may not use information obtained from Verizon's porting request to engage in retention marketing. No such situation applies to the video market. If Verizon convinces a customer to switch to its video service from Comcast, Verizon need not wait before it begins service, and it certainly need not provide any proprietary information to Comcast. When the customer cancels Comcast service, Comcast does not know whether the customer is switching providers, or is moving, or has simply decided not to subscribe any longer.

C. THE PUBLIC INTEREST AND PRIVATE INTERESTS WILL BE HARMED BY A STAY.

Verizon asserts that the public will benefit from a stay because individual customers whom Verizon attempts to retain may get better deals on their telephone service. But the Commission – the entity charged by Congress with determining the public interest – reasonably found that even though some individuals may benefit in the short term from Verizon's style of retention marketing, the long-run public interest in developing robust competition in the telephone market – which will benefit all consumers – outweighs immediate benefits offered to individual customers. *Order* ¶43 & n.104. The Commission made the same finding when it declined to forbear from enforcing section 222(b) in the *CPNI Reconsideration Order*. *See* 14 FCC Rcd at 14450, 14452-53.

Finally, Verizon claims that competing carriers "will suffer no cognizable harm" by competing for customers "subject to the same rules as Verizon." Mot. 20. But every customer that Verizon retains is a customer that its competitor loses. And, unlike Verizon, a cable company receives no proprietary information when its video customer switches to a competing service. The playing field is not level; it is *Verizon* that is unfairly advantaged in the absence of section 222(b), which is precisely why Congress enacted protection for the telecommunications market but took no such action in the video distribution market.

CONCLUSION

For the foregoing reasons, the Court should deny the motion for stay.

Respectfully submitted,

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July 8, 2008

EXCERPT OF THE JOINT STATEMENT
OF STIPULATED FACTS SUBMITTED
BY VERIZON AND COMPLAINANTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Bright House Networks, LLC,	)	File No. EB-08-MD-002
Comcast Corporation, and	)	
Time Warner Cable Inc.,	)	
	)	
Complainants,	)	
	)	
v.	)	
	)	
	)	
Verizon California Inc.,	)	
Verizon Delaware LLC,	)	
Verizon Florida, LLC,	)	
Contel of the South, Inc.,	)	
Verizon South Inc.,	)	
Verizon New England Inc.,	)	
Verizon Maryland Inc.,	)	
Verizon New Jersey Inc.,	)	
Verizon New York Inc.,	)	
Verizon Northwest Inc.,	)	
Verizon North Inc.,	)	
Verizon Pennsylvania Inc.,	)	
GTE Southwest Incorporated	)	
d/b/a Verizon Southwest,	)	
Verizon Virginia Inc.,	)	
Verizon Washington, D.C. Inc.,	)	
	)	
Defendants.	)	
	)	

JOINT STATEMENT OF STIPULATED FACTS,
DISPUTED FACTS, AND KEY LEGAL ISSUES

I. STIPULATED FACTS

The parties jointly stipulate to the following facts, for purposes of this litigation only and without conceding their materiality.

Cable operators also are the largest providers of high-speed Internet access services. And cable operators are the largest providers of video services.

14. Cable companies, including Complainants, also have invested substantial sums to upgrade their cable plant to allow them to serve customers with high-speed Internet access services and voice services which make use of the high-speed Internet access.

C. The LNP Process

15. Section 251(b)(2) of the Communications Act directs each local exchange carrier "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2). The Commission has delegated certain authority over number portability issues to the North American Numbering Council ("NANC"). *See* 47 C.F.R. §§ 52.11, 52.21-52.26.

16. Verizon offers LNP functionality in accordance with Commission regulations. In some cases, Verizon has entered into interconnection agreements with various LECs, including the Competitive Carriers, which recite that the parties to the agreements will provide number portability in accordance with the Commission's regulations.

17. When a Complainant receives an order for its retail voice service from a consumer who wants to retain his or her phone number, the Complainant employs a process to confirm the change in service provider through third-party verification (or through a letter of authorization).

18. When a customer decides to switch voice service from one facilities-based provider to another, the customer's voice service with the old provider must be

cancelled. And – if the customer so chooses – the customer's telephone number must be ported to the new service provider. Under process flows developed by the industry, the new service provider submits a single request that serves as both the customer's retail service cancellation request and the request to port the customer's telephone number.

19. Verizon has developed an internal process that enables the porting out of numbers in a timely manner when a Verizon customer chooses to switch to another provider's network and retain his or her number.

20. Verizon's involvement in the LNP process begins when Competitive Carriers (directly or via a contractor) submit a Local Service Request ("LSR") to Verizon Partner Solutions, informing Verizon that the telephone number is to be ported to the Competitive Carrier so that the Complainant served by the Competitive Carrier may initiate retail service using the customer's existing telephone number. The LSR requires the service provider that is submitting the request to identify itself, to give its order a unique Purchase Order Number, to designate the type of transaction desired, and to indicate the date and time for the termination of Verizon's retail service. The LSR also includes information about the retail customer, including the customer's name, location, Verizon retail account number, and desired treatment of telephone number listing. And the LSR also describes the nature of the desired number port – that is, whether it includes one or more numbers.

21. The LSR contains a field for Agency Authorization Status, which must contain a "Y" to indicate that the new provider has authorization to act on the customer's

permitted, but not required by the NANC process flows, and those process flows are not interrupted if an old provider does not send a confirmation.

33. On the due date, the new provider transmits an appropriate instruction through its SOA interface with NPAC to activate the port, and NPAC broadcasts the new routing instructions for the ported number to all subtending providers. At this point, as long as either (a) a 10-digit trigger is in place or (b) the old service provider has disconnected the customer's old service, calls to the customer's new service, including calls originating on the old service provider's switch from which the customer's old service was provided, will properly route to the customer's new service.

34. Verizon processes LNP requests within the industry-standard interval of three business days from the issuance of the confirmation (absent a contrary request from the new service provider). However, in Verizon's experience, only a minority of LNP orders have a requested interval of three business days. Some cable companies often ask for extended periods to allow them to complete the necessary physical work at the customer's premises.

D. Verizon's Retention Marketing Program

35. Beginning in or about the summer of 2007, Verizon began a program of retention marketing, as described in what follows.

36. Verizon attempts to reach out to those customers who have not already spoken with a Verizon retail representative, sending an overnight letter alerting customers to Verizon's competitive offers and asking them to call if they want to learn more.

37. As part of Verizon's program, it makes use of a "lead list" of customers whom it markets. To generate the "lead list" for its retention marketing program, Verizon begins with the universe of disconnect orders. The disconnect orders that are made use of in this process are prompted, indirectly, by the submission of an LSR. Verizon eliminates from the list generated by the disconnect orders customers who are purchasing service from a Verizon wholesale customer – for example, customers who are switching service to a reseller of Verizon service or a customer of Verizon's Wholesale Advantage product – or from a Verizon affiliate (*i.e.*, Verizon Wireless). Verizon also seeks to reach out to customers who have not already spoken with a Verizon retail representative, to inform customers about Verizon's bundle pricing and retention offers. (This is because when a customer calls Verizon directly to disconnect service, the representative has an opportunity to try to retain the customer at that time.) To that end, Verizon eliminates from the lead list customers who are not porting their telephone numbers from Verizon to another service provider. Verizon also excludes those disconnecting customers who are on do-not-call, do-not-solicit, do-not-mail, or do-not-email lists.

38. Verizon uses an automated process that compiles five pieces of information about each customer on the lead list: the name, telephone number, disconnect order number, due date, and address of customers with pending disconnect orders.

39. Verizon has tried different approaches to contacting its disconnecting customers, including the use of express delivery direct mail that urges the customer to contact Verizon. Such contacts have also included e-mails and automated telephone

messages. The direct mail letters have at times proposed that the customer "STOP" the "pending order to disconnect . . . Verizon service," expressed Verizon's desire to help the customer "avoid the hassle of switching companies," and asked "What can we do to retain your business"

40. In many cases, Verizon delivers an automated telephone message within 24 hours after receiving the LSR. Since in or around the summer of 2007, Verizon's marketing materials have encouraged them to remain with Verizon, and offered them price incentives including a $10 monthly discount off a bundle of voice, video, and high-speed Internet services, and American Express-branded reward cards in amounts that include $50, $100, or $200.

41. The information from the lead list also is loaded onto a database and can be automatically retrieved by a retail representative when a customer calls Verizon's Retention Centers in response to the direct mail. The first screen a customer service representative sees indicates whether the disconnect date is at least two days away. If this is not the case, the customer service representative is instructed to inform the customer that it is too late to stop the switch. (Verizon still attempts to persuade the customer to switch back to Verizon after completing the switch to the rival.) The representative also can see the disconnect order number and the disconnect due date.

42. When the customer calls Verizon in response to a retention campaign letter, the retention representative asks the customer why he or she is disconnecting service. The representative informs a customer who is migrating to another provider about the available service packages and promotional offers, in an attempt to persuade the

CERTIFICATE OF SERVICE

I, Joel Marcus, certify that I directed that a copy of the foregoing Opposition of the FCC to Verizon's Motion for Stay be served by hand on July 8, 2008, on the following persons:

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* Service no later than 9:00 a.m.

** Service as close as possible to 9:00 a.m.

Joel Marcus